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NOTE AND COMMENT

PUBLIC UTILITY VALUATIONS AND RATES.—In comparing the reports of the public utility commissions with the decisions of the courts on questions of valuation of public utilities, nothing is more striking than this—that as time goes on the commissions are growingly impatient of the cost of reproduction theory, while the courts still insist there is no inflexible method of fixing value, but continue to prefer largely figures as to supposed reproduction cost. This attitude of the commissions is remarkable in view of the fact that every finding may be carried to the courts for review and possible reversal. The Illinois Commission reluctantly obeyed the direct orders of the Supreme Court to consider cost of reproduction, but refuses to treat that as the only basis. *Re Springfield Consol. Ry. Co.*, P. U. R. 1920 E. 474, 480. The Interstate Commerce Commission ruled that it was practically impossible for it to find such value in the appraisal of lands of railroads as ordered by Congress in 1912. But the Supreme Court said it must do so because Congress had ordered it. *U. S.* v. *Interstate Com. Com.*, 252 U. S. 178. This was taken by many as an approval by the Supreme Court of the

Cost of Reproduction as the base of value, but that question was not involved.

The North Dakota Commission believes that wherever possible in cases involving a rate basis original cost data should be considered in finding present value, but finds the facts as to original cost not usually available. *Fargo* v. *Union Light Co.,* P. U. R. 1920 A 764. It therefore falls back on the broad generalizations of *Smyth* v. *Ames,* 169 U. S. 466. Those generalizations were doubtless wise in 1898, but in 1921, valuation should be on a much more definite basis. The Vermont Commission regarded estimated cost of reproduction new as defective, even if allowance be made for depreciation, first, because based on abnormally high costs of labor and materials, and second, because security holders should be entitled to a reasonable return upon investment. Therefore effort should be made to determine actual cost. *Re Colonial Power & L. Co.,* P. U. R. 1920 A 215. However, original cost alone, even if known, cannot be taken as a proper basis, says the Commission in *Milne* v. *Montpelier & Barre L. & P. Co.,* P. U. R. 1920 E 558. This is the attitude of many courts. It does not seem logical to the Michigan Commission that the customers of a public utility should be required to pay a higher rate merely to enable a utility, without the expenditure of a single dollar towards an increase of its capital investment, to profit from a high level of prices. *Holland* v. *Maguire,* P. U. R. 1920 B 149. It might be added that it is very logical to ask the users to pay the utility a return on capital that is invested at present high prices in order to furnish proper service, even though prices later may fall to a far lower level. The Tennessee Commission based rates upon a fair and adequate return upon the capital which had been invested in the property. Where the books did not show this, it was determined by cost of reproduction at the dates of installation, i. e., by the historical, and not the present, cost of reproduction. *Re Receivers Memphis St. R. Co.,* P. U. R. 1920 C 277. Fortunately in this case the books furnished reliable information as to actual cost in most instances. To the same effect is *Re Roanoke Waterworks Co.,* (Va.), P. U. R. 1920 C 745, quoting the opinion of Hon. Chas. E. Hughes in the *Brooklyn Borough Gas Co. Case,* P. U. R. 1918 F 335, an opinion that has been more often approved in recent cases before the Commissions than the decision of any court. It is quoted in nearly all the Commission cases herein referred to, e. g., by the Utah Commission in *Re Utah Gas and Coke Co.,* P. U. R. 1920 C 854, holding that there cannot be a disturbing of valuations theretofore fixed every time a change occurs in unit prices. See also *Re Southern Pac. Co.,* (Nev.), P. U. R. 1920 F 725, 775, and *Re Douglas Co. L. & W. Co.,* (Oreg.), P. U. R. 1920 E 667, 674, showing the effect of the cost of reproduction method in placing public utilities on the plane of private speculative enterprises. Preference for the original cost method, if a single test is to be applied, is expressed by the New Hampshire Commission in *Concord G. L. Co.* referred to in P. U. R. Mar. 3, 1921, vi.

In *Maires* v. *Flatbush Co.,* P. U. R. 1920 E 930, the New York Commission, First District, gives a long and careful discussion of bases of rate

regulation, especially as affected "in the present juncture of universal upheaval." It points out that "value" of property as a rate base is not "value" as applied to private property, and denies the deductions made from the decisions as to the reproduction cost. That basis was resorted to because actual expenditures could not be determined, or had not been prudently made. It was a mere "rule of convenience", and "original cost of property as a controlling factor in a rate base has been approved" by certain New York courts. The advantages of the "Actual Cost" method under the uniform system of accounts are pointed out, and the trend of decisions by regulatory commissions in favor of giving controlling weight to that method is dwelt upon, with many citations. The Commission for the Second District also approves, especially under the New York statute, the capital actually invested as the basis of return. *Re Sea Cliff, etc. Gas Co.*, P. U. R. 1921 A 211.

In *Re York County Water Co.*, P. U. R. 1921 A 439, the Maine Commission claims that a very substantial number of commissions now believe that "the money actually invested in an honest and prudent manner" is "a better basis for the ascertainment of fair value" than "an attempt to apply the reproduction less depreciation theory", which in many instances results "in ridiculous exaggerations of actual or probable conditions". This idea was further elaborated and insisted upon by the same Commission in *Re Lewiston Gas L. Co.*, P. U. R. 1921 A 561, 571. In *Re La Porte Gas & E. Co.*, (Ind.), P. U. R. 1920 F 586, 594-8, the Commission objected to giving much weight to cost of reproduction at present abnormal prices, the weight to vary with the degree of departure from normal cost, the greater the departure the less the weight. Many of the mental processes in fixing going value are described as "whimsical adventure in an unblazed forest of speculation." In *Re La Porte Gas & E. Co.*, (Ind.), P. U. R. 1921 A 824, 843, 859, the Commission regards with concern, as inconsistent, unsound, uneconomic, and inequitable, the New Jersey case of *Elizabethtown Gas L. Co.* v. *Pub. Utility Comm.*, 111 Atl. 729, *post.* See also *Re Central Union Tel. Co.*, (Ind.), P. U. R. 1921 B 813, 825. Present cost investment was used as a base on the facts of the case in *Re Houghton County Traction Co.*, (Mich.), P. U. R. 1920 E 350, was regarded as worthy of serious consideration in *Re Chesapeake & Potomac Tel. Co.*, (Va.), P. U. R. 1920 F 49, 88, recognizing the wide disagreement between courts and commissions, and was considered the most equitable basis in *Re Chesapeake & Potomac Tel. Co.*, (W. Va.), P. U. R. 1921 B 97, 108. The Illinois Commission, while compelled under the decision of the Supreme Court to consider cost of reproduction, refused to base a value on that without a showing of original cost. The Supreme Court has taken a similar stand, flatly refusing to take cost of reproduction as the sole basis of value. *State Pub. Utilities Com.* v. *Springfield G. & E. Co.*, (Ill.), 125 N. E. 891. An interesting history of the cost of reproduction method, at first advocated by the public and repudiated by the utilities, now insisted upon by the utilities and decried by the public, is found in *Re St. Joseph Ry. L. H. & P. Co.*, (Mo.), P. U. R. 1920 A 542. In

Whitehead v. *Niagara Falls G. & E. Co.*, P. U. R. 1920 C 265, the New York Commission, Second District, refused to add to the investment actually made an increase based on advanced costs of present day construction.

It must be admitted, however, that there is very little in recent decisions of the courts to show any considerable judicial trend in this same direction, though present conditions often compel the courts to restrict severely the use of cost of reproduction. In *Consolidated Gas Co.* v. *Newton*, 267 Fed. 231, Learned Hand, J., does not hesitate to take the burr in his firm grasp. He scorns the statement that cost of reproduction and original cost are each elements to be considered, as meaning nothing unless that the two are to be averaged, which no one will support. He seems right about this, but he does not shrink from the full acceptance of cost of reproduction as a rate base, with a continued, but not quite continuous, reappraisal of plants, and rising and falling of rates. That present value is hard to prove is no answer. He is prepared to allow the "fallen dollar", by which "the company gains nothing, the customers lose nothing."

In *Elizabethtown Gas L. Co.* v. *Pub. Util. Com.*, 111 Atl. 729, Justice Swayze, quoting *Lincoln Gas & E. Co.* v. *Lincoln*, 250 U. S. 256, plants the New Jersey court squarely for allowing present values, and considers that the dollar has depreciated one half, while interest rates have practically doubled. Does he approve doubling the fair value, and then doubling the rate on this doubled base value? The decision is cited with approval in *St. Joseph R. L. H. & P. Co.* v. *Pub. Serv. Com.*, 268 Fed. 267, which disapproved the method of valuation adopted by the Commission relying on original cost when obtainable. But see the severe criticisms by the Indiana Commission in *Re La Porte Gas & E. Co.*, P. U. R. 1921 A 824, 250-260. In *Houston Elec. Co.* v. *Houston*, 265 Fed. 360, the court disapproved confining the plaintiff to the cost basis, and the Michigan court in *Detroit* v. *Michigan R. Co.*, 177 N. W. 306, approved the cost of reproduction less depreciation method of appraisal for rate purposes. The actual cost was shown to be $7,299,148, and estimates of present value were $8,000,000, $10,913,191 and $12,974,937! There was a record of over two thousand pages. Valuation methods with such results at such cost leave something to be desired. In *Kings County L. Co.* v. *Lewis*, 180 N. Y. Suppl. 570, the New York Supreme Court, New York County, refused to agree with the contention of the utility for cost of reproduction, or of the city for actual original cost, as the proper basis, or to admit that there could be any hard and fast rule. To the same effect is *People* v. *Pub. Serv. Comm.*, 186 N. Y. Suppl. 177. But in *Winona* v. *Wisconsin-Minnesota L. & P. Co.*, (Fed.), P. U. R. 1921 A 146, the court flatly holds a rate ordinance must be considered with reference to present day, and not pre-war values.

The conclusion of this review of recent cases is that the Commissions, working at first hand with the practical problems of valuation generally lean more and more decidedly toward fixing value—so-called—of public utilities on prudent investment, largely, and in not a few cases wholly. The courts, on the other hand, still wallow in the uncertainties of the rule, which is

scarcely a rule at all, of *Smyth* v. *Ames,* making value a question of judgment. In the cases, judgments continue to vary as widely as ever. The courts are probably too firmly committed to a consideration of various elements to expect them to adopt the definite rule of fixing base values on prudent investment. Whether legislatures will step in here, and whether a legislative act making prudent investment the basis would be held to be constitutional is for the future to reveal. For a fuller discussion of these methods of valuation see 15 MICH. L. REV. 205. E. C. G.

DUE PROCESS OF LAW IN PROCEDURE. — There are two classes of cases which may arise under the "due process" provisions of the 5th and 14th Amendments of the United States Constitution, so far as rules of procedure are concerned. One embraces cases of new remedial processes which may be criticized as too radical. The other consists of cases of old processes which may be criticized as obsolete and out of harmony with prevailing conceptions of justice. Due process may thus be said to fill the wide space between those innovations which carry us so far away from established methods as to remove the safeguards which are deemed essential to the protection of person and property, and those ancient remedies which enlightened modern opinion condemns as barbarous.

Most of the cases which have come before the courts belong to the first class, and in dealing with them the problem has been how to determine the point at which departure from settled usage becomes so great as to undermine what are considered the fundamental principles of judicial procedure. Certainly the procedure in England at the time of the emigration cannot be "fastened upon the American jurisprudence like a straight-jacket only to be unloosed by constitutional amendment". *Twining* v. *New Jersey,* 211 U. S. 78, 101.

But the cases falling into the second class are much less numerous. It has been said that a process is due process of law if it can show the sanction of settled usage both in England and this country. *Hurtado* v. *California,* 110 U. S. 516. It would seem reasonable, however, to assume that the settled usage might become so remote in point of time and so out of harmony with contemporary ideas, as to cease to enjoy the quality of due process.

This argument was made in *Miedreich* v. *Lauenstein,* 232 U. S. 236, against the ancient rule that a sheriff's return cannot be falsified in the action in which it is made, and that a party not served with process, who is thereby deprived of his day in court, may nevertheless lose his property by judicial sale on a default judgment based on a false return, without being allowed to show that he was never in fact served. It appeared, however, that this rule of the ancient common law was still currently adhered to in a number of American states, and the Supreme Court of the United States felt itself unable to say that the rule was inconsistent with the due process clause of the 14th Amendment.

A more striking case of the same type has just come before the Supreme Court. In *Ownbey* v. *John Pierpont Morgan, et al.,* U. S. Sup. Ct., April